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No. 94-341

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TOUCHE ROSS & CO.,
Petitioner,

v.

CONGREGATION OF THE PASSION,
HOLY CROSS PROVINCE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

FRANCIS J. HIGGINS
(Counsel of Record)
JOHN J. VERSCAJ
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3000
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner Touche Ross & Co.

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Touche Ross & Co. ("Touche Ross") respectfully submits this reply brief in support of its petition for issuance of a writ of certiorari to review the decision of the Supreme Court of Illinois in *Congregation of the Passion, Holy Cross Province v. Touche Ross & Co.*, 159 Ill. 2d 137, 636 N.E.2d 503 (1994), *reh'g denied.*

I. The Petitioner Repeatedly Pressed and the Illinois Courts Passed Upon the Federal Question Arising From The Federal Courts' Judgments.

The principal argument posed by Respondent Congregation of the Passion, Holy Cross Province (the "Congregation") in opposition to Touche Ross' Petition for a Writ of Certiorari (the "Petition") is that Touche Ross did not "press" *constitutional* issues upon the Illinois courts in urging that they accord preclusive collateral estoppel effect to the determinations of the United States District Court for the Northern District of Illinois and the Seventh Circuit Court of Appeals. (Brief in Opposition at 18-22.) But the "pressed or passed upon" rule invoked by the Congregation[1] simply contemplates that Touche Ross press the *federal question* upon the state courts, not that the question be framed in federal constitutional terms. This Court, in granting certiorari petitions to review the failure of state courts to honor federal judgments, has clearly and uniformly held that the preclusive effect of a federal judgment is itself a "federal question" and has stated that "pleading a federal decree as *res judicata* in a state suit raises a federal question reviewable in this Court under [a predecessor to 28 U.S.C. § 1257(a)]." *Toucey v. N.Y. Life Ins. Co.*, 314 U.S. 118, 129 n. 1 (1941), citing *Dupasseur v. Rochereau*, 88 U.S. (21 Wall.) 130 (1875); *Deposit Bank v. Frankfort*, 191 U.S. 499 (1903); *Virginia-Carolina Chemical Co. v. Kirven*, 215 U.S. 252 (1909); and *Stoll v. Gottlieb*, 305 U.S. 165, 167 (1938), *reh'g denied*, 305 U.S. 675 (1938).

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[1]The Congregation repeatedly invokes what it characterizes as the "pressed *and* passed upon" rule, and asserts that this "rule" requires that a federal question be both raised and affirmatively decided below. However, "this rule operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon ..." *United States v. Williams*, 112 S.Ct. 1735, 1738-1739 (1992).

By presenting the federal judgments and determinations to the Illinois courts and urging upon them the need to give preclusive effect to these federal determinations, Touche Ross "pressed" this *federal question* on numerous occasions at every level of the Illinois court system. The Illinois courts "passed upon" this federal question by expressly refusing to honor the federal court determinations. (In accordance with Supreme Court Rule 14.1(h), Touche Ross' Statement of the Case specifies each stage in the proceedings in which this federal question was raised, the manner in which it was raised, and the way in which it was passed upon by the trial court, the appellate court and the Supreme Court of Illinois, supported by specific references to the record.)

The Congregation likewise suggests that Touche Ross cited Illinois precedents below in asking that the Illinois courts give collateral estoppel effect to the federal determinations. (Brief in Opposition at 17). This, of course, is true, but Touche Ross *also* cited federal precedents to support that position, including *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 553 (1990); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *Amoco Oil Co. v. Johnstone*, 856 F.2d 967, 969 (7th Cir. 1988), *cert. denied*, 490 U.S. 1046 (1989) (Brief of Appellant Touche Ross & Co. filed May 5, 1992 at 28-29 and 38) and *Schellong v. U.S. Immigration and Naturalization Service*, 805 F.2d 655 (7th Cir. 1986), *cert. denied*, 401 U.S., 1004 (1987), *reh'g denied* 482 U.S. 921 (1987) (Petition of Defendant-Appellant Touche Ross & Co. for Rehearing filed May 12, 1992 at 15).

Touche Ross argued to the Illinois Supreme Court that the federal determinations were dispositive of the Congregation's claims under both federal and Illinois law (as it stood at the time), but that the issue was "ultimately of constitutional dimension for the constitutional judicial power of the United States, the necessary and proper clause and the Supremacy Clause require

that state courts give full faith and credit to the judgments of the federal courts and this extends to the collateral estoppel effects of those judgments." (Brief of Appellant Touche Ross & Co. filed May 5, 1992 at 39, n.20.)

Touche Ross has not, as the Congregation asserts, espoused the "polar opposite" of the theory that prevailing federal law is inconsistent with the view of collateral estoppel "espoused" by the Illinois Supreme Court in the present case. (Brief in Opposition at 19.). Until the Illinois Supreme Court's surprising decision below, the Illinois law of collateral estoppel was identical to the prevailing federal law. In this case, however, the Illinois Supreme Court held, for the first time, that it would not give collateral estoppel effect to alternative federal findings, an approach totally inconsistent with federal law as articulated by most Circuits.[2]

II. The Supreme Court of Illinois Refused to Accord Collateral Estoppel Effect to Independent Alternative Determinations of the Federal Courts.

The Congregation states that the Illinois Supreme Court specifically held that the federal courts did not decide that "Touche Ross had made no misrepresentations to the Congregation," and thus did not decline to give collateral estoppel effect to such a determination. (Brief in Opposition at 29.) This is simply wrong. The Illinois Supreme Court did not deny that the federal courts had found that Touche Ross made no such misrepresentation.[3] The Illinois Supreme Court instead expressly held that, once it was

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[2]The court has recognized that even where a party has failed to press an issue in the proceedings below (which is *not* the case here), review by writ of certiorari is available when a court has disposed of a case on the basis of a new rule not addressed by the parties. *United States v. Williams*, 112 S.Ct. 1735, 1739 n. 2 (1992).

[3] The Seventh Circuit specifically stated that "[t]here simply were no misrepresentations made by the defendants to the Congregation." (800 F.2d at 182; App. E-8.) Touche Ross was a defendant.

determined by the federal courts that there was no primary violation of the securities laws, "any misrepresentations by defendant to plaintiff were not *relevant to the Federal claims*". (emphasis added.) (159 Ill.2d at 154; App. A-13.)

The Congregation also suggests that, according to the Illinois Supreme Court, the Seventh Circuit did not find that the Congregation and Touche Ross jointly agreed to the accounting treatment of the Newell positions. (Brief in Opposition at 29). But the Seventh Circuit, after finding that the decision was arrived at by Touche Ross after "consulting" with the Congregation, went on to find that the accounting treatment was spelled out in a footnote to the Congregation's own financial statements. Under the contract with Touche Ross, these were "the representations of management". The federal court clearly concluded that the parties *had* agreed on this accounting treatment. (800 F.2d at 184; App. E-13.) The Illinois Supreme Court did not deny that the federal courts found that such an agreement had been reached, but instead held that the finding was not "necessary to the federal adjudication", thus refusing to give effect to these alternative determinations. (159 Ill.2d at 153; App. A-13.)

III. The Dismissal Without Prejudice of the State Law Claims Does Not Negate the Collateral Estoppel Effect of the Federal Decisions.

Evidencing the same confusion about collateral estoppel as the Illinois Appellate Court (a confusion which the Illinois Supreme Court itself noted), the Congregation argues that collateral estoppel effect cannot attach to any of the prior federal determinations because the Congregation's state law *claims* were dismissed by the federal district court without prejudice. (Brief in Opposition at 27-28.) That dismissal is entirely irrelevant to the collateral estoppel issue. To argue otherwise, as the Congregation does, is to confuse *res judicata* (claim preclusion) and collateral estoppel (issue preclusion). Collateral estoppel applies to findings

and determinations where the "claim" or cause of action is different. The Illinois Supreme Court, in rejecting the very argument which the Congregation now resurrects, stated:

> While the Federal Court's dismissal of plaintiff's state law claims against defendant was not a final judgment on the merits, collateral estoppel could apply to findings made by the Federal Courts while ruling on the security (sic) law claims. . . . Plaintiff, therefore, is precluded from relitigating any findings that were made during the Federal Court's adjudication of the security (sic) law claims. (159 Ill.2d at 152; App. A-11.)

In short, despite the Congregation's efforts to bowdlerize the federal court opinions, it cannot be denied that both federal courts found *in the alternative* that: (a) there was no primary securities law violation to aid and abet and; (b) *in any event*, Touche Ross had not done what the Congregation alleged—misrepresent the value of the Newell arbitrage positions. It was the *second* alternative which the Illinois Supreme Court refused to honor, in contravention of federal principles requiring that such determinations be given preclusive effect.

CONCLUSION

Petitioner Touche Ross & Co. accordingly requests that a writ of certiorari issue to review the decision of the Illinois Supreme Court and that upon such review, the decision of the Illinois Supreme Court be reversed with instructions that judgment be entered for Touche Ross & Co. or, in the alternative, with instructions that upon retrial, Touche Ross shall be entitled

to an order collaterally estopping the Congregation from denying the matters determined against it in the federal court litigation.

Respectfully submitted,

Francis J. Higgins
(Counsel of Record)
John J. Verscaj
BELL, BOYD & LLOYD
Three First National Plaza
70 West Madison Street
Suite 3000
Chicago, Illinois 60602
(312) 372-1121

Attorneys for Petitioner
Touche Ross & Co.

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